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No. 79-28

In the Supreme Court of the United States

OCTOBER TERM, 1978

DAVID LAWRENCE BECKLEAN AND
JACK HENRY CORDSEN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 13a-21a) is reported at 598 F. 2d 1122. The opinion of the district court (Pet. App. 1a-12a) is reported at 464 F. Supp. 205.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1979. A petition for rehearing was denied on June 7, 1979 (Pet. App. 22a). The petition for a writ of certiorari was filed on July 7, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the district court's failure to question petitioners at sentencing concerning their understanding of the plea agreement entitled them to withdraw their guilty pleas after their convictions had become final.

STATEMENT

1. A 48-count indictment filed on April 27, 1978, in the United States District Court for the Western District of Missouri charged petitioners and three co-defendants with mail fraud, in violation of 18 U.S.C. 1341, wire fraud, in violation of 18 U.S.C. 1343, interstate transportation of goods obtained by fraud, in violation of 18 U.S.C. 2314, and conspiracy to commit those offenses, in violation of 18 U.S.C. 371.[1] On September 27, 1978, pursuant to a plea agreement, petitioner Becklean entered a plea of guilty to the two conspiracy counts, four counts of mail fraud, eight counts of wire fraud, and one count of interstate transportation of goods obtained by fraud, and petitioner Cordsen pleaded guilty to the two conspiracy counts, one count of mail fraud, four counts of wire fraud, and one count of interstate transportation of goods obtained by fraud. On November 20, 1978, petitioner Becklean was sentenced to a total of eight years' imprisonment, a $26,000 fine, and three years' probation. On that same date, petitioner Cordsen was sentenced to a total of eight years' imprisonment, a $29,000 fine, and three years' probation. Petitioners did not appeal their convictions. On January 2, 1979, petitioners moved to withdraw their guilty pleas pursuant to Rule 32(d) of the

[1]Petitioner Becklean was named in 26 counts, and petitioner Cordsen was named in 12 counts.

Federal Rules of Criminal Procedure. The district court denied the motion after an evidentiary hearing (Pet. App. 1a-12a), and the court of appeals affirmed (Pet. App. 13a-21a).

2. In May 1978, Assistant United States Attorney Robert B. Schneider offered petitioners a plea bargain under which, if they and co-defendant Kenneth Brown would each plead guilty to one count of conspiracy and to one count of either mail fraud or wire fraud, and if these three defendants would exonerate co-defendant Mark Cello, then the government would seek dismissal of the remaining counts against petitioners and Brown and all counts against Cello, would make no sentencing recommendation, and would not prosecute petitioners for other schemes to defraud. The offer was not accepted (Pet. App. 2a-3a, 14a). In July 1978, the prosecutor offered a second bargain that contained many of the terms of the first offer, including the provision that the government would make no recommendation at sentencing.[2] Petitioners and Brown rejected this offer as well (*id.* at 3a, 14a). Both of these offers by the government had cutoff dates after which they terminated (*id.* at 3a, 20a).

In late July or early August 1978, the case was reassigned to Assistant United States Attorney Cynthia Clark, who spent the next two months preparing for trial. During that time, she advised defense counsel that the government was "going to trial" on the indictment and that "the deal was off" on any previously extended plea offers (Pet. App. 4a, 14a, 20a). On the morning of September 27, 1978, two days before trial was scheduled to begin, the government and counsel for petitioners

[2]Under this agreement, however, petitioners and Brown would have had to plead guilty to 10 counts (Pet. App. 3a, 14a).

discussed another plea agreement under which Becklean would plead guilty to 15 counts and Cordsen to eight counts, and the government would seek dismissal of the remaining counts. That afternoon, after approving the proposal, petitioners entered their guilty pleas (*id.* at 4a, 15a).

During the course of the guilty plea proceeding required by Rule 11 of the Federal Rules of Criminal Procedure, the district court inquired into the existence and terms of the plea agreement. The court asked Assistant United States Attorney Clark what the plea agreement was for each of the petitioners, and in each case she responded only that the government had agreed to dismiss the remaining counts in exchange for the pleas; no mention was made of any agreement by the government not to recommend a sentence. Upon separate inquiry, each petitioner and his counsel stated that the Assistant United States Attorney had correctly presented the plea agreement (Pet. App. 15a).[3] The court then accepted petitioners' guilty pleas.

On November 20, 1978, petitioners appeared before the district court for sentencing. When the court asked ASUA Clark whether the government had any recommendation, she recommended that petitioner Becklean be sentenced to 25 years' imprisonment and a $35,000 fine (Pet. App. 6a, 16a). Becklean's attorney then stated that he had understood the plea agreement to preclude the government from making a sentencing recommendation, that he had so informed Becklean, and that the government's recommendation put him "in a situation where [he had]

[3]The pertinent colloquy is set forth in the opinion of the district court (Pet. App. 4a-6a) and the court of appeals (*id.* at 15a-17a n.2).

misled [his] client, either through [his] inadvertence or by [his] misinterpretation of the Government's position, or the Government changing its position" (*id.* at 17a). The court stated that it was not going to follow the government's recommendation (*ibid.*). Neither Becklean nor his attorney moved to withdraw the plea at that time, and Becklean was sentenced to a total of eight years' imprisonment and a $26,000 fine (*id.* at 8a, 17a). When AUSA Clark made the same sentencing recommendation as to Cordsen, neither Cordsen nor his attorney, both of whom had been present during Becklean's sentencing, protested in any way or moved to withdraw the plea, and they both responded in the negative when asked by the court if there was any reason why sentence should not be imposed. Cordsen was then sentenced to a total of eight years' imprisonment and a $29,000 fine (*id.* at 8a, 17a, 20a).

3. On January 2, 1979, two days before their sentences were to commence, petitioners moved to withdraw their guilty pleas on the ground, *inter alia*, that the government had breached the plea agreement by making a recommendation as to sentence. Following an evidentiary hearing held on January 9, the district court denied the motion by written memorandum dated January 12. The court found that although petitioners and defense counsel were of the "impression" that the government would make no sentencing recommendation, the plea agreement did not in fact contain that provision (Pet. App. 7a-8a). Moreover, based upon "[t]he history of plea bargaining negotiations," the court also found that petitioners' mistaken beliefs in that regard "did not play a substantial part in motivating [them] to enter their pleas of guilty" and that the court in imposing sentence "was not influenced even in the slightest degree" by the government's recommendation (*id.* at 8a). Accordingly,

the court concluded that "[n]o manifest injustice exists herein to be rectified by [petitioners'] motion" (*id.* at 11a). The court of appeals, accepting these findings of fact, affirmed the district court's refusal to set aside petitioners' guilty pleas (*id.* at 18a-21a).

ARGUMENT

Petitioners argue that because information was presented at sentencing that "contradict[ed] or repudiate[d] the testimony or responses on which the [petitioners'] original guilty plea was based" (Pet. 7), the district court had an obligation at the sentencing hearing to explore on the record whether the pleas were knowingly and voluntarily entered, as required by Rule 11 of the Federal Rules of Criminal Procedure. See *McCarthy* v. *United States*, 394 U.S. 459, 465 (1969). This argument is unavailing here and does not justify the Court's review of this case.

We note at the outset that petitioners did not appeal the judgments of conviction entered against them on November 20, 1978. Instead, they allowed those judgments to become final, and, after the time for appeal had run, sought to obtain vacation of their convictions by means of a Rule 32 motion. The motion thus constituted a collateral attack on their convictions and ought properly be judged under the standards applicable to motions brought under 28 U.S.C. 2255. Collateral relief from a conviction following a guilty plea is not available for technical defects in the proceedings leading to acceptance of the plea and imposition of sentence, but must instead be predicated upon a showing either that the plea was not knowing and voluntary, and was therefore constitutionally defective, or that there existed some other error causing "special prejudice to the defendant" (*United States* v. *Timmreck*, No. 78-744 (May 21, 1979), slip op. 3) and

"inherently result[ing] in a complete miscarriage of justice, * * * [or] inconsistent with the rudimentary demands of fair procedure." *Hill* v. *United States*, 368 U.S. 424, 428 (1962). In this case, the factual findings of the district court supported its conclusion that there was no miscarriage of justice concerning petitioners' convictions.

The district court fully observed the requirements of Fed. R. Crim. P. 11. At the time petitioners' pleas were entered and accepted on September 27, 1978, "the dictates of Rule 11 * * * were followed. The Court directly inquired as to the existence of a plea bargaining agreement and was told that the complete agreement was set forth. Despite the opportunity to do so, the terms of the agreement were not disputed at that time" (Pet. App. 10a). It was only at sentencing on November 20, 1978, that the alleged inconsistency arose.

Moreover, the district court did not err in the circumstances of this case in imposing sentence upon petitioners and in thereafter refusing to vacate their pleas. As the court of appeals noted (*id.* at 21a), once the allegations regarding the plea agreement came to light, "it would have been better for the court to have immediately questioned [petitioners] * * * as to their understanding of the Government's recommendations and whether, notwithstanding the court's intention not to follow them, the recommendations made any significant difference in their plea bargain." However, as the court of appeals also observed (*id.* at 20a; footnote omitted):

> [W]hen the court asked the Government for a recommendation and received one, neither defense counsel, both experienced attorneys, moved to withdraw [petitioners'] guilty pleas. It is true that Becklean's attorney protested that he may have misled his client, but no motion to withdraw the plea

followed. Cordsen's attorney stood mute. In addition Cordsen and his attorney responded in the negative when asked if there was any reason why sentence should not be imposed.

In these circumstances, the district court had little reason to question the voluntariness of petitioners' pleas.

Furthermore, the district court conducted an evidentiary hearing on petitioners' motion to withdraw their pleas. The court recognized as a general proposition (Pet. App. 11a) that if a "guilty plea is entered into voluntarily solely because of the erroneous advice [of defendant's counsel], or if it plays a *significant* part of the inducement, manifest injustice may result under the circumstances" (emphasis in original). See also *id.* at 19a. However, the district court specifically found in this case that the plea agreement did not bar the government from recommending sentence, that petitioners' erroneous belief to the contrary did not play a substantial part in motivating them to enter their pleas of guilty, and that the government's recommendation did not in the slightest influence the sentence imposed by the court (*id.* at 7a-9a).[4] These findings, which were accepted by the court of appeals (*id.* at 18a-21a) and are not challenged by petitioners in this Court, adequately sustain the conclusion that no manifest injustice is present here. Given the unusual circumstances of this case and the dispositive

[4]Although the government recommended sentences of 25 years' imprisonment and fines of $35,000, the court sentenced petitioner Becklean to eight years' imprisonment and fines of $26,000, and petitioner Cordsen to eight years' imprisonment and fines of $29,000 (Pet. App. 8a, 21a).

factual determinations by the courts below, further review by the Court is unwarranted. See *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5]The court of appeals' decision does not raise a conflict in the circuits. The cases cited by petitioners (Pet. 11-12) are inapposite here since they pertain to instances where the trial court failed to comply with proper procedures in accepting the plea, where the defendant in entering a guilty plea was misled by the trial judge or the prosecutor, or where the defendant affirmatively contradicted the basis for his guilty plea. Moreover, in none of these cases did the district court make factual findings that the defendant's plea was voluntary and not substantially induced by mistake.

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